

APPEAL NO. 050206
FILED MARCH 14, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 14, 2004. The hearing officer determined that the decedent did not sustain a compensable injury on _____, which resulted in his death. The appellant (claimant beneficiary) appealed the hearing officer's decision, contending that the decedent was in the course and scope of his employment and furthering the affairs of the employer at the time of the motor vehicle accident. Additionally, the claimant beneficiary asserts that the appeal is timely given that her attorney did not receive a copy of the decision and order until January 28, 2005, when the Texas Workers' Compensation Commission (Commission) sent by facsimile transmission (fax) a copy of the decision and order to the attorney and the claimant beneficiary filed an appeal on that same date. The respondent (carrier) responded that the claimant beneficiary's appeal is untimely, and that the hearing officer's decision should be affirmed. The claimant beneficiary filed a response to the carrier's response asserting that the appeal is timely given that her attorney did not receive the decision and order until January 28, 2005, and filed the appeal that same date.

DECISION

The hearing officer's decision has become final pursuant to Section 410.169 because the claimant beneficiary's appeal was not timely filed with the Commission.

Commission records reflect that on December 22, 2004, the hearing officer's decision and order was: (1) mailed to the claimant, carrier's representative, employer, and ombudsman; and (2) placed in the (City) carrier's representative's box. We note that the benefit review conference report and the decision and order state that the claimant is represented by an attorney, rather than assisted by an ombudsman. The claimant beneficiary's attorney states that she contacted the Commission on January 28, 2005, to inquire about the status of the decision and order and was informed that the decision and order was issued in "December 2004." Upon the attorney's request, the Commission faxed a copy of the decision and order to her on January 28, 2005, and on that same date the claimant beneficiary filed an appeal with the Commission and asserting that it was timely. The carrier filed a response on February 16, 2005, arguing that the claimant beneficiary's appeal is untimely because the decision and order was mailed to the claimant beneficiary and carrier's attorney on December 22, 2004; therefore "notice to the claimant [beneficiary] of the hearing officer's decision triggers the deadline for appeal." The carrier contends that the claimant beneficiary is deemed to have received the decision and order on December 27, 2004, pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(a) (Rule 102.5(a)) and that the appeal was filed later than the 15th day after the claimant beneficiary was deemed to have received the decision and order, thus the appeal is untimely.

Section 410.202(a) provides that to appeal the decision of a hearing officer, a party shall file a written request for appeal with the Appeals Panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and shall on the same date serve a copy of the request for appeal on the other party. Section 410.202 was amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code from the computation of time in which to file an appeal or a response. Rule 102.5(a) provides in part that after the Commission is notified in writing that a claimant is represented by an attorney or other representative, all copies of written communications to the claimant shall thereafter be sent to the representative as well as the claimant, unless the claimant requests delivery to the representative only. However, copies of settlements, notices setting benefit review conferences and hearings, and orders of the Commission shall always be sent to the claimant regardless of representation status.

In the instant case, the claimant beneficiary's attorney asserts that she did not receive the decision and order until she requested it from the Commission on January 28, 2005, and filed the appeal on that same date, thus the appeal is timely. While the claimant beneficiary's attorney asserts that she did not receive a copy of the hearing officer's decision and order, the file does not contain evidence that the claimant beneficiary herself did not receive her copy of the decision and order. The Appeals Panel has held that since the 1989 Act gives the party, not the attorney, the right to appeal, and provides the party, not the attorney, with 15 days in which to file an appeal, the operative date for determining the timeliness of the appeal is the date the claimant, not his or her attorney, received the hearing officer's decision. Texas Workers' Compensation Commission Appeal No. 92219, decided July 15, 1992; Texas Workers' Compensation Commission Appeal No. 941144, decided October 4, 1994. While Rule 102.5(a) does provide that written communications to the claimant shall be sent to the representative, this has been interpreted to be a courtesy copy as provided for in Commission Advisory 93-11, signed November 4, 1993, and does not operate to extend or change the 15 days after receipt of the hearing officer's decision by the party. Texas Workers' Compensation Commission Appeal No. 011059, decided June 26, 2001.

Commission Advisory 93-11, provides in part that:

All documents and notices related to workers' compensation dispute resolution proceedings that are required to be provided by the [Commission] to claimants will continue to be mailed to the Claimant. Notice to the Claimant for all purposes will be established by this notification. If the Claimant is represented by an attorney before the Commission, and the Commission has the address of such attorney in its files, *then a courtesy copy of all such documents will be mailed such attorney.* (Emphasis added.)

Commission records indicate that the hearing officer's decision was mailed to the claimant beneficiary on December 22, 2004. We note that the claimant did not dispute or provide evidence that she did not receive the hearing officer's decision from the

Commission. Pursuant to Rule 102.5(d), unless the great weight of evidence indicates otherwise, the claimant beneficiary is deemed to have received the hearing officer's decision on December 27, 2004, which was five days after the date it was mailed to her. We do not consider the claimant beneficiary's attorney's explanation that she did not receive a copy of the decision and order until January 28, 2005. Pursuant to Section 410.202, as amended June 17, 2001, and Rule 143.3(e), the claimant had until January 18, 2005, to mail her request for appeal to the Commission, and the mailed request for appeal had to be received by the Commission by January 26, 2005. The Commission received the claimant's appeal by fax on January 28, 2005. Accordingly, the claimant beneficiary's appeal was not timely filed and the jurisdiction of the Appeals Panel has not been properly invoked.

Having determined that the hearing officer's decision and order have become final under Section 410.169 because a timely appeal was not filed with the Commission, the Appeals Panel does not have jurisdiction to review the hearing officer's decision.

The true corporate name of the insurance carrier is **LIBERTY INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

**CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge